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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LORENTZ W. HANSEN,

PETITIONER,

- v. -

PRENTICE-HALL, INC.,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JULY 14, 1986

SUPREME COURT OF THE UNITED STATES

LORENTZ W. HANSEN,

Petitioner,

PRENTICE-HALL, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Lorentz W. Hansen respectfully requests that a Writ of Certiorari issue to the U.S. Court of Appeals for the Second Circuit to review the judgment of that Court entered April 17, 1986 dismissing the complaint herein which alleges publication of a judicial opinion containing a defamatory passage after amendment of the opinion to delete the defamatory passage.

QUESTION PRESENTED

If the original version of a judicial opinion is published in full more than a

week after its amendment to delete libelous accusations against counsel, can the publisher rely on Section 74 of the New York Civil Rights Law for protection against a lawsuit for libel, in the face of the requirement imposed by both the plain meaning and judicial interpretation of Section 74 of the New York Civil Rights Law that only "full, fair and impartial" reports of judicial proceedings are privileged?

LIST OF PARTIES

The names of all parties appear in the caption of the case. Petitioner is an individual, not a corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 788 F.R.2d 892 and is reprinted in the appendix hereto at page 1.

JURISDICTION

Petitioner, a resident of New York State, sued respondent, a corporation organized and existing under the laws of Delaware and registered to do business in New York, for libel, in the New York State Supreme Court. Thereafter respondent removed the suit to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. 1441 et seq. On September 11, 1985 the United States District Court granted respondent's motion for summary judgment and this order was affirmed and judgment was entered on April 17, 1986 by the United States Court of

Appeals for the Second Circuit. This Court's jurisdiction to review the April 17, 1986 judgment of the Second Circuit pursuant to 28 U.S.C. Section 1254(1) is respectfully sought to be invoked.

STATUTE INVOLVED

This case involves Section 74 of the New York Civil Rights Law, which reads as follows:

> "§74. Privileges in action for libel
> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published. This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof."

STATEMENT OF THE CASE

As noted, Petitioner sued respondent for libel in the New York State Supreme Court and defendant removed the case to the United States District Court for the Southern District of New York, in which court defendant obtained summary judgment on the grounds that the judicial opinion it had published was protected by Section 74 of the New York Civil Rights Law. The facts of the case are as follows:

On November 1, 1983, the U.S. Court of Appeals for the Second Circuit issued a slip opinion in the case of Lyddan vs. U.S.A., Dkt. No. 83-6022, which contained the following language:

> "In his memorandum decision, Judge Murphy perceptively opined that Lyddan's testimony was tailored to the facts of relevant case law, particularly Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978)."

On November 9, 1983, the Appellate Court issued an amendatory slip opinion

deleting this statement. This amended opinion appears at 721 F.2d 873 (2d Cir. 1983).

On November 17, 1983, defendant published in verbatim form the original slip opinion, including the above-mentioned deletion, after collating, annotating and indexing by defendant's editors, and circulated it to approximately 17,000 subscribers in unbound advance sheet (looseleaf) format.

The conduct of William C. Lyddan, who was the plaintiff in Lyddan vs. U.S.A.; of his attorney, who is the plaintiff in the present case; and of the witnesses who testified for the plaintiff in Lyddan vs. U.S.A. at all times measured up to the highest moral, ethical and professional standards. Suggestions to the contrary in the judicial opinions in Lyddan vs. U.S.A., which suggestions had an instantaneous, ruinous impact on the professional

reputation of counsel in that case (petitioner in this case) could not be more totally in error. Petitioner herein was specially admitted to the bar of the United States District Court for the District of Connecticut to try the case of Lyddan vs. U.S.A. Every member of the Connecticut bar that petitioner had occasion to speak to during that period expressed outrage at the occasional abberrant behavior of the senior judge who presided at the trial of Lyddan vs. U.S.A. After judicial misconduct charges were brought, the trial court, having previously denied a motion to reconsider, suppressed its opinion in Lyddan vs. U.S.A., i.e., the trial court specifically requested West Publishing Company not to print it, which request West complied with. However, this fact did not become known until well after the Second Circuit Court of Appeals affirmed the trial court's opinion (721 F.2d 873) and until well after

this Court denied a request for review (cert. den. 104 S.Ct. 2656).

The previously-quoted section of the New York Civil Rights Law protects from libel suits a publisher of a "fair and true" report of a judicial proceeding. Thus the question posed by this case is whether under New York law a verbatim version of a judicial opinion continues to be a "fair and true" report after changes have been made in that judicial opinion, or whether mention must be made of these changes if the report is to be considered "fair and true".

REASONS FOR ALLOWANCE OF THE WRIT

THE ISSUE PRESENTED IN THIS CASE HAS BEEN DECIDED IN PLAINTIFF'S FAVOR BY THE NEW YORK COURT OF APPEALS; THIS PRECEDENT IS CONTROLLING UNDER 28 U.S.C. 1652, WHICH MANDATES APPLICATION OF THE LAW OF NEW YORK STATE IN THIS DIVERSITY OF CITIZENSHIP

CASE. As the Court said in Gertz v. Welch, 418 U.S. 323, 341, (1974), the right of an individual not to be defamed

> "reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the ninth and tenth amendments. But this does not mean that the right is entitled to any less recognition by this court as a basic of our constitutional system." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion).

It is interesting that all of the reasons advanced by the Court in Gertz for allowing the plaintiff - an attorney allegedly libelled by a news publication - to recover damages are present in this case. These include the relative inability (here impossibility) of the defamed individual to rebut the false charges; the fact that the individual defamed would himself be answerable for defamatory statements were the tables reversed; the absence of any strong policy reason for preventing

such plaintiffs from suing [no policy would seem to exist against requiring, in cases such as this in which the opinion seemingly went out of its way to insult and defame nearly everyone in sight, a single phone call to counsel or the court in question to find out whether the court had been asked to reconsider its opinion. West Publishing Co. made just such a call in Lowenschuss v. West Publishing Co., 542 F.2d 180 (3rd Cir. 1976)]; the fact that private individuals are very vulnerable to injury from defamatory utterances; and finally the fact that the plaintiffs in neither case had exposed themselves to the kind of defamatory attacks to which they had been subjected. See Gertz v. Welch, supra 336 et seq.

Section 74 of the New York Civil Rights Law protects publishers of reports of judicial proceedings in the event that matters set forth in accusations, complaints, findings, opinions, etc. are fac-

tually untrue. In return it exacts only a minimal price, namely, that the publisher ascertain that the version of the accusations, etc., that is published be "full, fair and impartial." Stevenson vs. News Synd. Co. 302 N.Y. 81 (1951) and Lewisohn v. Dial Press, 264 App.Div. 370 (1st Dept. 1942).

In Lewisohn v. Dial Press, Inc., 264 App.Div. 370 (1st Dept. 1942) a New York intermediate appellate court held that a report based on a judicial decision later reversed, without mention of the reversal, did not constitute a "fair and true" report of a judicial proceeding and was, therefore, not privileged but actionable. In fact New York law has always been clear that there are finite limits to the privilege. These are contained in the statute itself, Section 74 of the Civil Rights Law which does not require tolerance by the courts of any report of a judicial

proceeding but only of a "...fair and true report..." of such a proceeding. New York's highest court has squarely held to this effect. Stevenson vs. News Syndicate Co. 302 N.Y. 81 (1951). In that case the New York Court of Appeals stated:

> "The privilege established by Section 337 (predecessor of Section 74, Civil Rights Law) for reports of judicial proceedings embrances only 'full, fair and impartial' reports of such proceedings (Lee v. Brooklyn Union Pub. Co., 209 N.Y. 245, 248)." Stevenson, supra, p. 88. (Bracket added).

In the Stevenson case the then wife of the plaintiff in that case, in the course of a divorce proceeding, had made a motion for temporary alimony, charging her husband in the papers supporting the motion with infidelity. On August 13, 1948 the motion was withdrawn and on August 14, 1948 a withdrawal order was filed in the office of the Clerk of New York County. On August 18 and 19, 1948 the Daily News, defendant in the later libel action, published newspaper

accounts of the case relying solely on the papers that had been submitted in support of the motion for temporary alimony. These newspaper accounts described the misconduct alleged in the motion papers, but made no mention of the fact that the motion had subsequently been withdrawn. The New York Court of Appeals said:

> "The article said that Stevenson's wife made her charges against him 'yesterday' -- an assertion that was false. The article made no mention of the fact that the charges were made as part of a motion which had theretofore been withdrawn -- an omission that was unfair. In short, the article was neither true nor fair and consequently the privilege declared by section 337 of the Civil Practice Act did not attach to it. We pass on no other question. Stevenson, supra, p. 88." (Emphasis added).

The newspaper involved in Stevenson had even less time to acquire knowledge of the subsequent events in the proceeding which rendered the published account "unfair" - only 4-6 days. Defendant herein had over a week - November 9 to November 17, 1983. And defendant herein is more versed in

court procedure than Daily News reporters.

Analytically there are two separate and distinct factual aspects of any application of Section 74 of the New York Civil Rights Law to a report of a judicial proceeding.

The first consists of the factual events which gave rise to the controversy that was the subject of the judicial proceeding. It is clear from the language of this particular shield law that its purpose was to obviate the need on the part of a reporter to investigate these factual events in accordance with the normal requirements of responsible journalism. Almost by definition, of course, these factual events will have occurred many years before the judicial proceeding itself, thus greatly adding to the usual burdens of news gathering, and, in addition, reconstruction of past events is a task for which a judicial proceeding

itself, rather than the journalistic profession, is better suited. Hence the desireability from the standpoint of the public's right to know of permitting reporters to rely on the statements of fact, expressions of opinion, etc., that evolve out of a judicial proceeding. Nor does plaintiff question this policy al all when the absolute privilege of Section 74 attaches, as in Beary v. West Publishing Co. 763 F.2d 66 (2d Cir. 1985) cert. den. 1065 S.Ct. 232 (1985).

The second aspect consists of the factual events which take place in the course of the judicial proceeding itself, and it is equally clear from the language of the statute that the legislature did not intend to excuse reporters of judicial proceedings from investigating these factual events in accordance with all the normal requirements of responsible journalism. These factual events are more

or less contemporaneous with the report itself, and presumably reporters are capable of ascertaining the truth about these events and are capable of fairly and truly reporting them. In so doing they may not rush to press, abjuring all investigation or hoping that others will do their job for them and inform them of whatever they ought to know. As the New York Court of Appeals expressed it in ruling that there are finite limits to this statutory shield:

> "If it should be said that the haste with which they are obliged to publish, leaves them no time to inquire as to the facts, it is not exacting too much to require them to postpone the publication of the libelous portions of the account until a proper investigation into their truth can be made." Sanford v. Bennett, 24 N.Y. 20 (1861). Page 28.

Thus the news organization in Stevenson v. News Syndicate Co., 302 N.Y. 81 (1950) was not protected by the statutory shield, having failed to note that 4 days before its news story was published

the motion for temporary alimony, supported by affidavits on which its news story was based, had been withdrawn. Similarly the book publisher in Lewisohn v. Dial Press, Inc. 264 App. Div. 370 (1st Dept. 1942) was not protected by the statutory shield, having failed to note that the lower court decision on which the book was in part based had been reversed on appeal prior to publication of the book.

Thus it is clear that the statutory shield protects reporters of judicial proceedings only when others have made factual errors, not when they themselves have made factual errors, and this latter category of factual errors includes failures to note developments which took place in the judicial proceeding in question after information-gathering for the report but prior to publication of the report. Stevenson vs. News Syndicate, supra. No other meaning can be ascribed to the words

"fair and true" found in Section 74 of the New York Civil Rights Law, which words expressly qualify the statutory shield protecting publishers of false and defamatory matter emitted by a judicial proceeding. And the most authoritative source concerning the scope of this statutory shield, the New York Court of Appeals, has said:

> "The privilege...must be kept strictly within proper bounds...and not extended beyond the limits of the statute." Campbell v. New York Evening Post, 245 N.Y. 320 (1927).

Under diversity principles this case is governed by this repeatedly-expressed view of the New York Court of Appeals that the Section 74 absolute privilege should not be extended beyond the language of the statute. Sanford v. Bennett, supra; Campbell v. New York Evening Post, supra; and Stevenson v. News Syndicate, supra.

At any time after November 3, 1983 - two weeks before defendant published the

opinion in issue - defendant could have learned from plaintiff that plaintiff was shocked and nearly suicidal at the threatened destruction of an unblemished reputation based on 20 years of work and that plaintiff had urged the court by informal motions (telephoned and telegraphed) to withhold, pending a request for amendment, its November 1, 1983 opinion. And at any time after November 9, 1983 (still more than one week from the November 17, 1983 date of publication) defendant could have learned from the court itself that its opinion had been revised. Whether contacting the Court under such circumstances, and by necessary implication training its editors (who review opinions with a fine tooth comb for defendants own purposes) to be on the lookout for defamatory matter, would unreasonably burden the publishers of law reports is not here relevant. Defendant doubtless could accommodate itself to

the exigencies of such a rule - many other publishers accommodate themselves to infinitely greater burdens imposed on them by the libel laws. This is a matter for the New York State legislature - which in the past has extended the scope of this statutory shield to further protect publishers of law reports (see headnote amendment, Laws of 1930, chapter 619). The legislature can consider the problem and weigh the relative interests of the judiciary, the public and the victims of libel by judicial opinion, and, if it so desires in the interests of the People of the State of New York statutorily repeal the decision of the New York Court of Appeals in Stevenson v. News Syndicate, supra, holding that whether any published report of a judicial proceeding is "fair" is to be determined as of the time of publication, and not as of the time the publisher obtained its information. That the report may have been "fair"

at the earlier of the two dates is not sufficient to raise the statutory shield if the report was not "fair" at the latter of the two dates. And no good reason exists or is found in the statute for distinguishing between verbatim reports and summary accounts such as appear in newspapers and magazines. In fact the task of the publishers of verbatim reports is much simpler in this regard, since they need only ascertain if changes have been made, in the extremely rare instances in which judicial opinions contain libelous matter. They need not be concerned whether in other respects there has been compliance with the fair and true requirement. In fact so light is the burden of verbatim reporters of judicial opinions as compared to other reporters of these opinions that the view has obviously become widespread that the statutory shield has been made available to them without the extension of any

concomitant responsibilities whatsoever. But this view is contrary to the plain meaning of Section 74 of the New York Civil Rights Law, as interpreted by the New York courts. Defendant, of course, does not simply publish as hastely as possible the judicial opinions it obtains from its sources. Defendant reviews these opinions carefully to add citations to its own reports and to extract headnotes. This process evidently takes time since the decision herein was not published by defendant until 9 days after it was acquired by defendant. Plaintiff's motion to depose defendant's employees to determine whether any precautions, adequate or otherwise under the circumstances, were taken by defendant to guard against publication of frivilous, mistaken, libelous, etc. matter, was denied by the trial court. Such precautions might be burdensome - although in the present case a single telephone call to

plaintiff or the court clerk prior to November 17, 1983 would have disclosed that the panel that decided the Lyddan v. U.S. appeal had been asked to modify its opinion, and had in fact done so on November 9, 1983.

But the burdensomeness of such a requirement is not a legal issue for resolution by this Court - this issue has already been resolved by the legislature of the State of New York which has prescribed that only "fair and true reports" of judicial proceedings are privileged. New York Civil Rights Law Section 74. This draws a reasonable line between conflicting public policies - the right of publishers to circulate judicial opinions, and the right of individuals to be secure in their good names. The social interest of protecting reputations - particularly the reputations of members of a learned profession such as the law, which are patently vulnerable in

the extreme to harm by defamation - outweighs any burden on the publishers of law reports resulting from the "fair and true" requirement. But whatever the finite limits of this absolute privilege are to be, they should be prescribed by the New York State legislature, which is free to consider whether reports such as the one now in issue, considered by the victim of the libel contained therein to be egregiously unfair and untrue as compared to the final version of the judicial opinion in question, should nevertheless be eligible for the statutory shield.

CONCLUSION

In view of the important contribution of the Federal bar to the work of the Federal courts, petitioner respectfully requests this Court to grant certiorari and review the judgment of the Second Circuit Court of Appeals.

APPENDIX

OPINICN OF LCWER COURT

MESKILL, Circuit Judge:

Lorentz W. Hansen appeals from a judgment of the United States District Court for the Southern District of New York, Motley, C.J., granting Prentice-Hall's motion for summary judgment and dismissing Hansen's complaint. Prentice-Hall cross-appeals from the denial in that same judgment of its motion for sanctions against Hansen pursuant to Fed. R. Civ. P. 11.

Affirmed.

BACKGROUND

Attorney Hansen was trial and appellate counsel in Lyddan v. United States, 721 F.2d 873 (2d Cir. 1983), cert. denied, 467 U.S. 1214 (1984). Our decision in that case was issued on November 1, 1983. The slip opinion included a sentence

which Hansen claims defamed him as Lyddan's trial attorney.

On Hansen's urging, we deleted the sentence by an order dated November 9, 1983. Meanwhile, however, Prentice-Hall had received a copy of the original slip opinion on November 8. Prentice-Hall published the original opinion verbatim in the advance sheet edition of its American Federal Tax Reports on November 17, 1983.

Hansen alleged in his complaint that he had notified Prentice-Hall prior to publication of the advance sheet that he considered the sentence to be libelous and that the sentence did not appear in our "actual" opinion. In his affidavit to the district court in opposition to summary judgment and in his reply brief to this Court, he stated only that he believed he had notified Prentice-Hall that he was attempting to have the sentence removed. Prentice-Hall claims that it actually

learned of the amendment of the opinion upon receipt of a letter from a circuit judge's law clerk on November 28, 1983. The amended version of the Lyddan opinion was published in the bound version of American Federal Tax Reports.

Hansen, acting pro se, sued Prentice-Hall for libel in New York Supreme Court in August 1984. Prentice-Hall removed the suit to the district court on October 19, 1984, and moved for summary judgment and sanctions on August 2, 1985.

In a memorandum opinion dated September 11, 1985, Chief Judge Motley granted summary judgment but denied sanctions. She held that Prentice-Hall was immune from suit under New York Civil Rights Law section 74 as construed in Beary v. West Publishing Co., 763 F.2d 66 (2d Cir.), cert. denied, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985). Noting that an issue might have existed as to whether section 74

applied if Prentice-Hall had received notice of our amendment of Lyddan prior to publication, Chief Judge Motley found that Hansen's mere allegation of his belief regarding notification was insufficient to defeat the motion for summary judgment. Finding, however, that Hansen might have believed in good faith that he could prove notice and thereby distinguish this case from Beary, Chief Judge Motley denied Prentice-Hall's request for sanctions. Hansen appealed from the grant of summary judgment. Prentice-Hall cross-appealed from the denial of sanctions and also seeks sanctions on appeal.

DISCUSSION

New York Civil Rights Law section 74 immunizes the publisher of a "fair and true report" of a judicial proceeding from civil suit. N.Y. Civ. Rights Law § 74 (McKinney

1976). See Beary, 763 F.2d at 68. Hansen's primary claim on appeal is that the publication at issue here was not a fair and true report because the judicial opinion published by Prentice-Hall had been amended prior to its publication. The claim is meritless.

Hansen relies on two old New York decisions, Stevenson v. News Syndicate Co., 302 N.Y. 81 (1950), and Lewisohn v. Dial Press, Inc., 35 N.Y.S.2d 551 (App. Div. 1st Dept. 1942), for the proposition that the publication of a court's original opinion after that opinion has been amended is not protected by section 74. In both of those cases, however, the publication was not of the opinion itself but rather of defamatory facts for which a judicial opinion or filing was cited as authority. Here, Prentice-Hall published an indisputably accurate rendition of our original opinion in Lyddan v. United States. "Since

[Prentice-Hall's] publication of [our] opinion reproduced it precisely as written by the [Court], it clearly constituted a 'fair and true report' within the meaning of § 74," Beary, 763 F.2d at 68; cf. Lowenschuss v. West Publishing Co., 542 F.2d 180, 186 (3d Cir. 1976) (verbatim publication of opinion containing allegedly defamatory footnote held absolutely privileged), absent any showing that Prentice-Hall had received notice of the amendment prior to publication.

Assuming arguendo that proof of notice of the amendment prior to publication might have made a difference in the outcome here, the district court correctly found that there was no substantiated allegation of notice sufficient to defeat a motion for summary judgment. In his affidavit in response to summary judgment, as in his reply brief on appeal, Hansen stated only that he believed that he had notified

Prentice-Hall. Such a statement failed even to allege notice, let alone prove it. Cf. Eastway Construction Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985) (mere conclusory allegation insufficient to defeat summary judgment).

We turn now to the issue of sanctions. As discussed above, there were state court decisions that arguably could be read to indicate that the post-amendment publication of an original judicial opinion might not be privileged under section 74. Although there were discrepancies, as also noted above, between the factual allegations regarding notice in Hansen's complaint and those subsequently made in Hansen's affidavit and his reply brief on appeal, the district court's finding of his good faith on this point was not clearly erroneous. Because Hansen could "form a reasonable belief that [his complaint was] well grounded in fact and...warranted by

existing law," Rule 11 sanctions were not appropriate below. Eastway, 762 F.2d at 254. For similar reasons, sanctions are not appropriate on appeal. See In re Cosmopolitan Aviation Corp., 763 F.2d 507, 517 (2d Cir.), cert. denied, 54 U.S.L.W. 3407 (U.S. Dec. 16, 1985); cf. Mone v. Commissioner, 774 F.2d 570, 574 (2d Cir. 1985) (applying Eastway standard to frivolous appeal).

The judgment of the district court is affirmed.